

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 5 - WAIVER BY DEFENDANT**

If you found that Kanag'Iq is correct, and the contract was a unit price contract and that it was not modified and that it was breached by GMW, GMW claims that its failure to keep its promise was excused because defendant waived plaintiff's performance.

There are two kinds of waiver. Waiver can be expressed in words or implied by conduct. An implied waiver occurs when the defendant's conduct

- (a) indicates an intention to waive the right, or
- (b) is inconsistent with any intention other than to waive the right,  
or
- (c) prejudiced the plaintiff because defendant neglected to insist on the right.

Plaintiff's failure to keep the promise is excused for this reason if it is more likely true than not true:

- (1) that the defendant knew that it had a right, under the contract, to require the plaintiff to perform under the original written contract; and
- (2) that the defendant freely and intentionally waived that right.

If you decide that both of these things are more likely true than not true, the plaintiff is excused for its failure to bill under the original written contract.